No. 82-2120

Office-Supreme Court, U.S.
FILED
OCT 6 1983
ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THOMAS F. SMITH, JR., et al.,

Petitioners,

—v.—

WILLIAM P. ROBINSON, JR., Rhode Island Associate Commissioner of Education, et al.,

Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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STATEMENT

Subsequent to the filing of our Petition, yet another court of appeals' decision has been rendered specifically addressing one of the much-litigated issues presented for review in our Petition. Espino v. Besteiro, 708 F.2d 1002, 1006-10 (5th Cir. 1983). In order to bring this decision to the attention of this Court, we hereby file this Supplemental Brief pursuant to Rule 22.6 of the Rules of this Court.

REASONS FOR GRANTING THE WRIT

In our Petition at 7-20, we pointed out that the First Circuit's decision denying all fees in this case under the Fees Act, 42 U.S.C. § 1988 as amended, was contrary to the express intent of Congress as set forth in H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 4 n.7 (1976); was contrary to this Court's decision in Maher v. Gagne, 448 U.S. 122, 128 n.10, 132 & n.15 (1980); and was contrary to four courts of appeals' decisions which specifically

addressed the first issue presented here: Monahan v. Nebraska, 687 F.2d 1164, 1172 (8th Cir. 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 1252, 75 L.Ed.2d 481 (1983); Robert M. v. Benton, 671 F.2d 1104, 1106 (8th Cir. 1982); Jose P. v. Ambach, 669 F.2d 865, 871 (2d Cir. 1982); Hastings v. Maine-Endwell Central School District, 676 F.2d 893, 897 (2d Cir. 1982).

Subsequent to the filing of our Petition, the Fifth Circuit, in Espino v. Besteiro, 708 F.2d 1002, 1006-10 (5th Cir. 1983), not only found the foregoing authority to be controlling, but also expressly rejected the reasoning used and the conclusion reached by the First Circuit in the Smith case, the case under review here.

In Espino, as here, plaintiffs asserted constitutional claims, a Rehabilitation Act claim, and a claim under the Education for All Handicapped Children Act; plaintiffs prevailed by obtaining the relief sought although the constitutional and Rehabilitation Act

claims were never addressed on the merits; and plaintiffs thereafter filed for attorneys fees under the Fees Act, 42 U.S.C. § 1988, and under the fee provision of the Rehabilitation Act, 29 U.S.C. § 794a(b).

The Fifth Circuit in Espino held that plaintiffs were entitled to fees under the Fees Act.[1/] In the Fifth Circuit's view, this conclusion was compelled by Congress' intent as set forth in the House Report, and was further compelled by this Court's decision in Maher v. Gagne, 448 U.S. 122 (1980). See Espino, 708 F.2d at 1007-08. The Fifth Circuit also relied on the courts of appeals' decisions rendered on this frequently litigated issue, see Espino, 708 F.2d at 1008; and the Fifth Circuit analyzed and rejected the decision reached by the First Circuit here: "We reject

1. In view of its decision under the Fees Act, the Fifth Circuit did "not reach the question whether fees should have been awarded under § 794a(b) [of the Rehabilitation Act]." Espino v. Besteiro, 708 F.2d 1002, 1003 (5th Cir. 1983). The Fifth Circuit in Espino accordingly did not address the second issue presented for review in our Petition for a Writ of Certiorari at ii, 20-25.

the First Circuit's reasoning in Smith," see Espino, 708 F.2d at 1009.

CONCLUSION

For the reasons set forth in our Petition and in this Supplemental Brief, the Petition for a Writ of Certiorari should be granted, and the decision of the First Circuit should be summarily reversed.

Dated: October 5, 1983

Respectfully submitted,

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